No. 12,162

In the United States
Circuit Court of Appeals
Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

vs.

RAYMOND DOWNUM and EDNA DOWNUM, husband and wife, Appellees.

BRIEF FOR APPELLANT UNITED STATES OF AMERICA

Upon Appeal from the District Court of the United States for the District of Idaho Northern Division

HON. CHASE A. CLARK, Judge

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Filed ....., 1949

....., Clerk

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Index

AUTHORITIES

Table of Statutes

Table of Cases

Table of Cases (Continued)

Other Authorities

I.

Statement of the Case

This appeal is from a judgment of the United States District Court, Northern Division, against the United States and in favor of Raymond Downum and Edna Downum, in the amount of $64,973.88. The action was brought under the provisions of the Federal Tort Claims Act. (28 USCA 931, et seq).

Statement of Facts and Record

Plaintiff-Appellees allege that on or about May 14, 1947, Raymond Downum, age 35, was driving a Model A truck, which he owned, a few miles west of Bonners Ferry, Idaho, and was proceeding in an easterly direction, in the early afternoon of that day. Corporal Clyde W. Smith, a member of the United States Army, and on active duty and acting under orders that day, was driving a truck owned by the United States, and was proceeding in a westerly direction approaching the vehicle of Raymond Downum. Plaintiffs further allege that Corporal Smith collided, head on, on his left hand side of the road with the truck driven by Raymond Downum, this collision causing severe injury to Raymond Downum, as a result of which Raymond Downum suffered severe injury, all of which is set out in the Complaint.

The Government denied the allegations of Raymond Downum and the matter went to trial before the Court on the question of whether or not the Government's employee was negligent and the amount of damages suffered by Mr. Downum. Upon the conclusion of the trial, the Court found for appellees in the total amount of $64,973.88.

Thereafter, on June 22, 1948, Findings of Fact, Conclusions of Law (Tr. 19), and Judgment (Tr. 23) were entered. Notice of Appeal (Tr. 25) was filed August 19, 1948, and the Court extended the time of filing the record and docketing the Appeal from September 22, 1948, until November 23, 1948. (Tr. 26).

Thereafter, on September 29, 1948, the appellant filed a Motion for Order Amending and Correcting Findings of Fact and Conclusions of Law, (Tr. 27) and in response and in reply thereto, the appellees filed a Motion to Strike, or in the Alternative to Amend Findings of Fact. (Tr. 28).

Thereafter, on October 28, 1948, the Motion to Amend the Order and Correcting Findings of Fact came on to be heard. The Court sustained the position of the Government and denied the Motion of the plaintiff to correct the Findings in regard to the life expectancy of Raymond Downum. (Tr. 29). The Court then instructed the plaintiff to re-draw the Findings of Fact and to include a finding for pain

and suffering. Appellant objected, and took exception to the Court's granting permission to counsel for appellee to include the findings for pain and suffering. (Tr. 29).

Thereafter, on November 1, 1948, counsel for appellee filed Amended Findings of Fact and Conclusions of Law (Tr. 30). No amended judgment was filed in this case. The Government filed Notice of Appeal on December 13, 1948, (Tr. 164), and is prosecuting this appeal from the complete record made in the lower court.

II.

Specifications of Errors

Appellant sets out herein, the errors which it claimed in its statement of points under Rule 19, and will set them out in the same order in which they are carried in the transcript of record. (Tr. 165).

1. That the Court erred in the award made for pain and suffering in that it is excessive under all of the facts presented in this matter.
2. The Court erred in awarding the amount it did for loss of earnings in that the Court was without any basis of fact for such finding.
3. That the Court erred in using an annuity table alone as a basis for computing the award to compensate for loss of earnings.
4. That the Court erred in making an amend-

ed finding and award for pain and suffering on the hearing for the Motion to Amend Findings of Fact and Conclusions of Law.

5. That the Court erred in amending the Findings of Fact and Conclusions of Law to include the award for pain and suffering for the reason that there was nothing before the Court at that time upon which to base such award.

6. That the Court erred in making one finding of damages sustained for pain and suffering, personal injuries, loss of earnings, and permanent physical disability.

7. That the Court erred in making a finding for loss of wages in the absence of proof with respect to the damages, impairment of earning capacity and the present worth of each of the future installments of lost earnings suffered by the plaintiff.

III.

Argument

For the purpose of consolidating this brief and without waiving any of the points which are listed in the Specifications of Errors, appellant consolidated the specifications, and directs its argument toward certain phases of the record. It appears to appellant that there are several general points which incorporate all of the specifications of error and in

presenting the matter to the Court, appellant feels it can be done this way rather than going into each individual specification of error, and perhaps duplicating the arguments and citations of authorities.

1.

Appellant charges that the Court erred in making an award for loss of future earnings, which future earnings were based on the life expectancy of 31 years, unsupported by any proof other than "judicial notice" of a life expectancy table. The transcript of record discloses nothing regarding the appellee's physical condition prior to the accident or the use of life expectancy tables in determining the appellee's probable life expectancy other than the following excerpt:

> "MR. YOUNG: 'I think the Court takes judicial knowledge or notice of the mortality table. It is alleged that he had a certain expectancy of life.' "
>
> "MR. CASTERLIN: 'It is understood and agreed that the Court takes judicial notice.' " (Tr. 145).

The appellant has examined carefully the transcript in this cause and fails to find any evidence which would support the lower Court's Findings to the effect that the plaintiff had, at the time of trial, a life expectancy of 31 years. (Findings No. 6, Tr.

20). The life expectancy of Mr. Downum cannot be determined by reference to a mortality table, alone. The mortality tables serve no purpose other than to give the average duration of the lives of great numbers of persons. It does not establish the longevity of any particular person. Let us refer to what the Court said in *Vicksburg and Meridian Railroad Company vs. Putnam.* (118 U. S. 545).

> "Life and annuity tables are framed upon the basis of the average duration of the lives of a great number of persons. But what the jury in this case had to consider was the *probable duration of the plaintiff's life and the impairment of the capacity to earn his livelihood.*"

It is obvious from a study of that case that the Court used a mortality table together with other competent testimony, as to the condition of his health prior to the accident. A careful examination of the transcript of evidence in this trial reveals that there was no evidence introduced upon which the Court could base a finding as to the life expectancy of Mr. Downum. There was no expert testimony or testimony of any kind as to the state or condition of his health, or as to the number of years that he could reasonably expect to live, therefore, there was no reasonable basis upon which the Court could arrive at a figure to represent the number of years Mr. Downum would live.

Quoting from McCormick on Damages, page 302,

there is found the following statement, which is indicative of the general rule:

> "In any event, if the life expectancy, as disclosed by a mortality table, is admitted, the jury should be instructed that this is not conclusive, but is merely to be considered along with all the other evidence as to plaintiff's age, health, habits, and occupation, in determining the probable length of life."

And this Court has so held in *Estabrook* v. *Butte, Anaconda & Pacific Ry. Co.*, 163 F. 2d 781.

Therefore, appellant contends that there is no evidence to support an award of $64,973.88, when it is based on the record before this court. Let us note, closely, the language of the Court's Findings, first taken from Finding No. 6, first paragraph. (Tr. 32).

> "That immediately prior to the collision of said vehicles, plaintiff Raymond Downum was a strong, healthy, able bodied man, aged 35 years; that immediately after said collision, and as a result therefrom, said plaintiff became lame, sick, sore, and disordered, and shall remain so for the remainder of his natural life, which, according to the American Mortality Table, is 31 years."

The Court was in error in making this finding of the life expectancy of Mr. Downum. Mr. Downum

could have had an incurable disease, which might have shortened his life considerably. There is no proof before the Court what his health condition was at the time of the accident and prior thereto. There was no evidentiary basis for the Court's finding relative to the longevity of Mr. Downum. This record is bare of any supporting evidence necessary to permit the proper use of the mortality table, and the Judgment is not supported by the evidence in making this award.

2.

Appellant has stated as a specification of error, among others, that the Court erred in permitting counsel for appellee to amend the Findings of Fact and Conclusions of Law on the hearing of October 18, 1948, at the time we were moving the Court for its Order amending and correcting the Findings. This motion was made for the reason that we appellant felt the Court had made a mathematical error in computing the amount of loss of future earnings. The Findings of Fact, at that time, were as follows:

> "that the plaintiff will in the future sustain a general loss of earnings as a proximate result of said injuries in an amount found by the Court to be $58,500." (Finding No. 10. Tr. 22).

It is obvious that a man who is earning only $3,000 a year, and only 60% incapacitated, would not

have a loss of future earnings of $58,500, and this was called to the Court's attention and the Court agreed. An injured man is entitled only to recover a sum which takes into account his probable expectation of earnings, and to receive that sum discounted for present payment.

Appellant admits that damages are recoverable for impairment of earning capacity as a result of injuries found to be permanent. However, they must be capable of ascertainment with reasonable certainty. (15 Amer. Jur. Section 89, page 499).

> "Generally a recovery may also be had for loss of future earnings, provided they are shown with reasonable certainty and are not merely speculative in character."
>
> *McClain* v. *Lewiston Interstate Fair and Racing Assn., Ltd.*, et al, 17 Ida. 63; 104 Pac. 1015.
>
> *Roy* v. *OSLRR*, 55 Ida. 404-418; 114 P. 2d 258.

Damages recovered for loss of future earnings or earning capacity must be discounted for present payment, and only the present value thereof included in the award. (15 *Amer. Jur.*, Sec. 95, page 505; *Chicago and Northwestern Railroad Co.* v. *Candler*, C.C.A. 8, 283 Fed. 881; 28 A.L.R. 235). The damages here awarded greatly exceed the cost of an annuity, less the allowance for diminution of wages

caused by advancing years. The burden is upon the plaintiff to produce evidence with respect to his damages, impairment of earning capacity, and present worth of each installment of lost earnings suffered by him. The only matter before the Court was the motion to compute correctly the award as to the loss of future earnings.

Appellant here offers the sample computation to this Court that was offered the lower court, to substantiate our position that the award was too high. Incidentally, as the matter stood in the original Findings, there was no award for pain and suffering, as appellant reads the record, and the full $58,500 was for loss of earnings.

> Plaintiff's age was 35 years, taking the Court's finding on its face, and had a life expectancy of 31 years; that he was incapacitated to a degree of 60%, and was earning at least $3,000 a year. He has an earning capacity on his own of 40%, or $1200, for the balance of his life. His earnings, then have, theoretically, been reduced by $1800. We call to the attention of the Court, that there will be an inevitable fall in his earning power, which will grow with advancing years. (Roy v. OSLRR, p. 419, supra); (McCormick on Damages, page 306; Krause v. Chicago & Northwestern Railroad Co., 102 Wisc. 196; 78 N.W. 446). However, for the purpose of this argument, let us give Mr. Down-

> um the benefit of the presumption that he would earn the full $3,000.00 to the day of his death. In determining the cost of an annuity, we turned to Vol. III, p. 386 of the new Idaho Code. There appears a table under the heading: "Annuity Valuation Tables," and gives the present value of $1.00 due at the end of each year during the life of a person of specified age. This is based on Actuaries' Combined Experience Table of Mortality. The present discounted value of $1.00, returning interest at the rate of 6%, due at the end of each year, is $12.861 for 31 years. The loss to the appellee is $1800, and therefore, we multiply that sum by 12.861, and this results in $23,149.80.

This may be used as a guide in determining the loss of earnings of a man making $3,000 a year who has been 60% disabled and who has a life expectancy of 31 years, the amount being presently discounted. Thus, we find that the Court should have awarded the sum of, approximately, $23,149.80, plus the $3,000.00 for the one year of total disability, or $26,149.80 for the loss of earnings. Appellant concedes that this is not a fixed rule, but is simply a medium or standard by which the Court may measure or strike an average in determining the loss of future earnings.

If the Court should adopt the figure of approximately $23,149.80 as the approximate loss of future

earnings of Mr. Downum, the balance of the $58,500 or $35,350.20 is greatly excessive. The remaining sum of $6,473.88, being the balance of the $64,973.-88, is accounted for by reason of hospital bills in the amount of $3,473.88 and $3,000 loss of wages for one year. Mr. Downum cannot realize a profit from his accident for loss of future earnings, but an award, if any is made, is to recompense him or make him well. That is to say, to repay him for the loss of future earnings, theoretically, if it could be computed so accurately, it would mean that it would give him the exact amount he would earn during his lifetime.

> "If they made this allowance upon the theory that he was entitled to a sum which, properly invested, would yield him an amount annually equal to his past or expectant wages during his life, leaving the principal undiminished for his estate at his death, and without considering the fact that his earning capacity, while lessened, was not wholly destroyed, then, according to all the authorities they erred."
>
> *Roy* v. *Oregon Short Line Ry. Co.*, 55 Ida. 404, at 418; 42 Pac. (2d) 476.

Appellant wants to point out that this is the record on the original Findings of Fact. Let us examine the Amended Findings of Fact. Finding No. 6 (Tr. 32 and 33) has combined several findings therein, and it appears to us that the Court attempted to make the

finding on loss of future earnings, and pain and suffering, although the last paragraph of Finding No. 6 of the Amended Findings (Tr. 33) specifies:

> "that plaintiffs have sustained the damage for pain, suffering, personal injuries, and permanent physical disability, including a special damage hereinabove found, in the sum of $64,-973.88."

Assuming, for the sake of the argument, that the Court had the authority to amend the Findings of Fact to include pain and suffering, it must be determined, if possible, how much was awarded Mr. Downum as damages for pain and suffering over loss of future earnings. Eliminating $23,149.80 from $58,500 as an approximate loss of earnings, the remaining sum, $35,350.20, must be for pain and suffering. Appellant contends that this sum is excessive under the evidence produced in this cause.

It must be borne in mind that Mr. Downum has made a 40% recovery, and is capable of earning approximately $1200 a year by his own efforts. There are many jobs and types of work which a man with his percentage of disability can reasonably fill.

It is difficult to lay down an exact rule as to what constitutes an excessive award in cases of this type. It is appreciated that courts are not bound by any strict mathematical formula in arriving at damages of this type, because they are, by their very nature,

speculative. However, courts are bound within well defined limits of reason and discretion in this matter, as is specifically pointed out in *McAlinden* v. *St. Maries Hospital Assn.*, 28 Idaho 657, on page 681, which reads as follows:

> "It is clear that a recovery should not be allowed to the extent of a vindicative or punitive judgment. If the master has been guilty of wanton or criminal negligence, it is the clear and unmistakable duty of the state to deal with him through the criminal laws, and to allow the servant to recover to such an extent only as will leave him as nearly as possible in as good a position as he was before the infliction of the injury."

Incidentally, in this case, the Idaho Supreme Court reduced the trial court's judgment from $12,000.00 to $8,640.00.

In support of our opinion that the award is excessive, appellent cites a few of the following cases which may be of some assistance in an attempt to fix the award in this case:

Faris vs. Burroughs Adding Machine Co., 48 Idaho 310. An 18 year old boy suffered severe brain injuries. Recovered $25,100.

Hayhurst vs. Boyd Hospital, 43 Idaho 661. An able bodied farm hand, completely disabled by reason of improper hospital care. Recovered $15,250.

Kinzell vs. Chicago etc., Ry. Co., 33 Idaho 1. A 29 year old plaintiff with life expectancy of 35 years, seriously disabled. Recovered $25,000. (See 31 Idaho 365).

Osier vs. Consumers Co., 42 Idaho 789. A 56 year old lady lost use of right arm. Recovered $8,000.

Keim vs. Gilmore & Pitts Ry., 23 Idaho 511. A 76 year old man permanently injured. Recovered $9,000.

Crumback vs. Murdock, 168 P. (2d) 25. A 26 year old man, laborer, truck driver, with 38 year life expectancy. Permanently injured. Recovered $25,000.

Isle vs. Kaw Transp. Co., (Kans. 1944) 152 P. (2d) 827. A 48 year old man, injuries resulting in permanent shortening of leg. Recovered $4,000. Recovery reduced from $6,000 to $4,000.

Appellant respectfully calls to the attention of the Court those cases listed in Roy v. OSLRR, supra, on this point.

In conclusion, on this point, appellenat thinks that the total award of $58,500 is greatly excessive under all the facts and circumstances. It is excessive under the finding on the original Findings of Fact, where there was no award for pain and suffering, and believes the award is excessive if this court

should find the trial court had the authority to amend the findings.

III.

Appellants final argument is that the Court was without authority to change the basis of the award, and in support of its position herein states that the Court erred in permitting the amendment to the findings of fact. It believes that the Court is governed by Rule 52 of the Rules of Civil Procedure, which provides as follows:

(a) "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions of the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it

will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary or decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41 (b)."

(b) "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

As appellant has stated repeatedly, there was nothing before the Court but a motion to correct the original findings, and neither party, within 10 days of the entry of the judgment moved the Court for an order amending or making additional findings in order to avail the moving party of the benefit of Rule 52.

The appellant had come in under the provisions of Rule 60, in order to correct a mathematical or cleri-

cal error in the computation of the award, and which the Court, by its own motion would have had the authority to correct. The action of the Court in making new findings has basically altered the award. As the award now stands, it is impossible to tell whether $58,500 was awarded for pain and suffering, or for loss of earnings, or for any other reason; or if any portion of it, or what proportion is for any specific loss of appellee.

Rule 52 provides that special findings shall be made. We construe this to mean that the Court originally should have found specially, or for each item of the damages, and that it should not have been a lump sum award in this case. We believe our position is sustained by the case of *Interstate Circuit Inc. et al vs. United States*, 304 U.S. 55.

Conclusion

In this appeal, the appellant has taken the position that the Court erred in the use of the mortality table to determine the life expectancy of the appellee, Raymond Downum, without other competent testimony as evidence; that the Court erred in computing the amount of the award for loss of earnings; that the amount awarded was excessive, either considering it as loss of future earnings award, or as loss of future earnings and pain and suffering; and lastly, permitting the counsel for the appellee to change the basis of the award by making additional findings for pain

and suffering, at a time when the matter was not before the Court.

It is appellants belief that the record will sustain our appeal that the matter be reversed, and the cause be remanded to the lower court for further action.

Respectfully submitted,

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